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No. 93-30

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DAVID A. HAMMOND, *et al.*,
Petitioners,

v.

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

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QUESTION PRESENTED FOR REVIEW

Whether the court below correctly determined that the Air Line Pilots Association, International did not breach its duty of fair representation when its actions in connection with the acquisition by one airline of another were designed to protect the best interests of the plaintiff pilot class and were neither discriminatory, in bad faith, nor wholly irrational, and the plaintiff class overwhelmingly ratified the seniority integration agreements which their lawsuit attempts to vacate?

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BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

In 1986, Trans World Airlines, Inc. ("TWA") agreed to acquire Ozark Airlines, Inc. ("Ozark"). Thereafter, negotiations were conducted between the Ozark and TWA pilots to arrive at an integrated pilot seniority list. With the extensive mediatory assistance of the Air Line Pilots Association, International ("ALPA"), the exclusive bargaining representative of both pilot groups, agreements were reached between the two pilot groups, through their chosen representatives, and with TWA (the "Merger Agreements"). The Ozark pilots (the plaintiffs in this lawsuit) demanded and were granted the right to have the final say on whether the Merger Agreements could be implemented. After being briefed on the Agreements and advised of the alternatives to ratification, the Ozark pilots voted for the Agreements by a 329 to 35 margin.

The Seventh Circuit affirmed the District Court's determination that ALPA did not breach its duty of fair representation ("DFR") in connection with the seniority integration because ALPA's actions were rationally related to legitimate objectives and were neither discriminatory nor undertaken in bad faith. The appellate court's ruling is fully consistent with DFR decisions of this Court and other appellate courts and presents no issues of importance warranting review.

COUNTERSTATEMENT OF THE CASE

The following counterstatement is offered to provide a more "accurate description" of the facts and proceedings below than that provided by petitioners. App. 43.[1]

A. The Facts

In 1985, Texas Air Corporation, headed by Frank Lorenzo, tried to acquire TWA. The TWA pilots greatly feared a Lorenzo takeover. To counter Lorenzo, the TWA pilots assisted a competing takeover effort by Carl Icahn, offering to accept massive concessions if Icahn prevailed, which he eventually did. In exchange, Icahn agreed, in a document known as the "Wraparound Agreement," that if Icahn/TWA subsequently acquired another airline, the TWA pilots would be protected against any reduction in or transfer of TWA aircraft, and that ALPA's consent would be required for any merger of the pilot seniority lists of TWA and the acquired carrier. App. 3, 46-48; *see generally Barthelemy* v. *Air Line Pilots Ass'n, Int'l,* 897 F.2d 999, 1003-04 (9th Cir. 1990). These protections were in addition to furlough

[1] "App. ——" refers to the appendix submitted with the petition for a writ of certiorari. "Pet. ——" refers to the petition. Deposition transcript excerpts ("Tr.") and declarations ("Decl.") from the record on appeal are cited by the name of the deponent or declarant. Document exhibits are identified by party and "Ex." number. All references to the record on appeal are to materials in docket number R.159 unless otherwise indicated.

(layoff) protections that the TWA pilots had acquired as a quid pro quo for other pre-Icahn concessions. TWA Ex. 8.

In 1986 TWA acquired Ozark. App., 4. The Ozark pilots did not have contractual protections comparable to the aforementioned protections that the TWA pilots enjoyed. App., 4, 17, 46-48, 50.

After TWA agreed to acquire Ozark, a disagreement arose between the TWA and Ozark pilot groups over how best to merge their seniority lists. The more senior TWA pilot group favored an integration based on the date each pilot was hired by his respective airline. App., 4. The Ozark pilots (*contra* Pet., p. 3) proposed a different integration methodology which furthered their interests. App., 4.

Under ALPA's internal merger policy—which is *not* binding on air carriers, App., 17—the pilots employed by merging carriers initially attempt to arrive at a seniority integration agreement through negotiations, "with the help of a professional mediator if necessary." Pet., p. 2. Arbitration is utilized only if a prescribed lengthy period of negotiations and mediation does not produce an agreement. App., 4 (*contra* Pet., p. 2). In order to best serve the affected pilots' interests, ALPA, when implementing merger policy, necessarily takes into account the circumstances presented by a particular transaction. R.196, Duffy Decl., ¶¶ 2-3; Duffy Tr. 65-66, 78-80; *see* App., 17 (and *contra* Pet., pp. 2, 15, 18, 19).

The two pilot groups disagreed over whether ALPA's merger policy was applicable to the TWA-Ozark transaction: the Ozark pilots argued that it was; the TWA pilots believed the policy was superceded by the Wraparound Agreement. App., 43. Notwithstanding the TWA pilots' position, the two pilot groups proceeded as they would have under merger policy, attempting to negotiate an agreement. R.156, ¶ 30 and R.167, ¶ A-30.

Both the Ozark pilots and ALPA recognized that a prompt integration was essential to protect the Ozark pilots from "calamitous" consequences which the TWA-Ozark transaction threatened, including a serious risk of Ozark pilot furloughs. App., 17, 43. To accomplish that objective and prevent "premature intra-union litigation" and warfare which were likely to result from formal implementation of merger policy at that time, App., 18, 43-44; Duffy Tr. 143-44, ALPA established an approach for achieveing an integrated seniority list which was functionally equivalent to that prescribed by the merger policy, assigning an experienced mediator to assist the two groups in their efforts to negotiate an integrated list. App., 4, 18; ALPA Ex. 24. Through these efforts, the differences between the two groups were substantially narrowed. Ettel Tr. 109-11, 129-33, 178-79 and ALPA Exs. 70, 78-79. ALPA additionally sought to protect the Ozark pilots by petitioning the Department of Transportation, the courts and Congress to condition approval of the carriers' merger on TWA's adherence to labor protective provisions. App., 5.

While the integration efforts continued, TWA unilaterally acted to transfer four aircraft, of a type operated pre-merger by both airlines, from Ozark to TWA, laid off 86 Ozark pilots and threatened further transfers and furloughs. App., 4, 18, 50. In response, ALPA offered to initiate and pursue any legal challenges the Ozark pilots desired. App., 43, 50. TWA's actions, however, were not prohibited by the Wraparound Agreement (which, *contra* Pet., pp. 6-7, 22, "barred shrinkage at TWA but not a transfer of planes into TWA," App., 4; *supra*, p. 2), the ALPA-Ozark collective bargaining agreement (the "CBA"), *supra*, p. 3, or merger policy (to which TWA was not bound, App., 17).

When the initial mediation efforts had not produced a complete agreement, ALPA proceeded as the Ozark pilots desired, R.196, Ettel Tr. 57 (*contra* Pet., p. 5) and against the wishes of the TWA pilots (*contra* Pet., p. 4),

by formally initiating merger policy, App., 43, 50, and, taking account of the prior mediation efforts, shortened the time period before either group could trigger arbitration. O'Toole Tr., 191-92. With the assistance of ALPA-appointed "super-mediators," the pilot groups reached an agreement between themselves and with TWA upon an integrated list which dovetailed the seniority of the two pilot groups, granting all pilots identical credit for their seniority at their respective carriers. App., 4-5, 18-19, 43-44, 53. The Ozark pilots were additionally granted "protective cells," guaranteeing many of them captain and first officer positions which their seniority on the integrated list would not have otherwise entitled them to hold and which would have otherwise gone to TWA pilots. App., 5 (*contra* Pet., pp. 5-6, 19—suggesting, on the basis of a single TWA pilot's assessment, that Merger Agreements had no adverse impact on TWA pilots).

The Ozark pilots demanded and were granted the right to make "the ultimate decision" whether to approve the integration. O'Toole Tr. 214-18; Yaiser Tr. 29-30. After being provided copies of and briefed on the Merger Agreements, afforded an opportunity to ask questions of their chosen representatives and counsel, and advised of the consequences of their vote and available alternatives (including returning to the bargaining table, proceeding under merger policy, and/or instituting litigation—all of which ALPA continued to offer), R.156 ¶¶ 67, 69, 70 and R.167, ¶ A-67, 69, 70; R.196 Duffy Decl., ¶ 9, the Ozark pilots approved the integration by a better than 9 to 1 margin. App., 4-5, 48, 50. Only after and because of the Ozark pilots' affirmative vote did ALPA President Henry Duffy give the Union's consent to the seniority integration (contrary to the suggestion at Pet., pp. 10, 18 that it was ALPA that determined the seniority integration) which was required for the integration to be effective under the Wraparound Agreement. App., 4, 10, 50.

B. Proceedings Below

Plaintiffs filed a class action suit on behalf of the former Ozark pilots claiming that ALPA breached its DFR, for which TWA was jointly responsible, by delaying formal implementation of merger policy. App., 5, 18, 42-45. Plaintiffs additionally alleged violations of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401 *et seq.*, the Wraparound Agreement and the Ozark-ALPA CBA. App., 5, 18, 46, 49-52.

The district court initially ruled that ALPA "did not breach its duty of fair representation" and that "the Ozark pilots were not coerced in any manner that would vitiate" their "overwhelming" vote "in favor of approval of the terms of which plaintiffs complain." App., 35, 38-39. The Seventh Circuit denied plaintiffs' motion for summary reversal, App., 36-37, remanding "for the limited purpose of allowing the district court to enter a complete statement of [the] reasons" for its ruling. App., 37.

The district court's subsequent memorandum decision, App., 40-54, applied the DFR standard established by this Court to the record in this case, App., 42-46, and found that "there is no genuine issue of material fact as to whether ALPA's actions were arbitrary, discriminatory, or in bad faith; they were not." App., 46. Among other things, the district court found that: any delay in formal merger policy implementation was the result of ALPA's attempt "to obtain the best bargain possible" for the Ozark pilots while "resolv[ing] the seniority-list-integration issue on a basis acceptable to both pilot groups," App., 44, 50; the settlement which plaintiffs' lawsuit challenged was a product of the "incredibly weak" bargaining position of the Ozark pilots, "rather than a breach of ALPA's [DFR]", App., 44; any legal challenge against TWA was "uncertain" and could have resulted in "a lengthy period of joblessness for the Ozark pilots," App., 43, 50; there

was "no coercion or duress that would vitiate" the Ozark pilots' overwhelming vote in favor of the Agreements, App., 53; and there was no evidence that ALPA's conduct was improperly motivated. App., 44-45. The district court further concluded that the Ozark pilots possessed no rights under the Wraparound Agreement which were breached and that their overwhelming vote in favor of the Merger Agreements was not the product of any LMRDA violation "but rather a rational decision that the Ozark pilots were better off ratifying the agreement" than pursuing "an uncertain lawsuit," and disposed of their other breach of RLA and contract claims against TWA. App., 46-53.

The court of appeals unanimously affirmed.[2] It found that: ALPA merger policy was not binding on TWA and "could not compel TWA to agree to anything," App., 17; the Wraparound Agreement imposed no limits on TWA's ability to move aircraft from Ozark to TWA, to "put TWA's pilots to work in [the Ozark] cockpits," and to otherwise "apply[] the screws" to the Ozark pilots, App., 4, 17-18; and rotely "[c]ramming the 'merger policy' down the throats of an unwilling cadre at TWA" would have impeded efforts to reach a seniority integration agreement, which "could have been calamitous for Ozark's pilots." App., 17. The appellate court further determined that: ALPA's merger policy was not etched in stone and did not prohibit "experimentation and change when circumstances warrant," App., 17; ALPA actions reflected its attempts to amicably "bridge the gap between Ozark's and TWA's pilots," and avoid "premature intra-union litigation," App., 17-18; the agreed-upon dovetailed integration reflected a rational result, App., 16; ALPA withheld its consent to a seniority integration until the pilot groups had reached an agreement, which the Ozark pilots overwhelming approved, App., 4, 18; and ALPA's actions were "rationally related to a legitimate objective." App.,

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[2] The decision also addressed another DFR case, *Rakestraw* v. *United Airlines, Inc.*

15. The court also found that ALPA had made additional efforts before Congress, governmental agencies and in the courts to protect the Ozark pilots. App., 5.

The Seventh Circuit concluded, based on the record, that plaintiffs' allegations of ALPA wrongdoing were without evidentiary support and that ALPA's actions met all three prongs of the DFR standard: they did not fall "so far outside a 'wide range of reasonableness' " as to have been "arbitrary," App., 10-11, 16-17; *Air Line Pilots Ass'n, Int'l* v. *O'Neill,* 111 S.Ct. 1127, 1135-36 (1991) (citation omitted); they did not discriminate against the Ozark pilots "for a reason forbidden on substantive grounds, such as race or internal union politics," App., 11, 17-18, and thus did not reflect "invidious 'discrimination' of the kind prohibited" by the DFR, *O'Neill,* 111 S.Ct. at 1137; and they did not in "bad faith" intentionally injure the plaintiffs. App., 11-13, 17-18. The court held that plaintiffs' remaining claims "founder[ed] on their own vote in favor of the merger and the ensuing new collective bargaining agreement," App., 18-19, which further dispelled any claim that ALPA's alleged wrongs had caused plaintiffs' injury. App., 19. The court further held that to permit plaintiffs to disavow their overwhelming approval of the integration as allegedly coerced would ignore the factual and legal reality ("TWA had every right to use economic pressure," App., 18) and conflict with the "peaceful . . . contractual resolution of differences" which is "[o]ne of the principal objectives of labor law." App., 18.

The appellate court denied plaintiffs' petition for rehearing and suggestion for in banc rehearing. App., 26-27.

SUMMARY OF ARGUMENT

The decision below involves the application of established DFR principles to undisputed facts and is consistent with decisions of this and other appellate courts. The petition presents no issues warranting Supreme Court review.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT

The petition principally urges that review is needed because the decision below allegedly "collapsed" this Court's tripartite DFR standard into "a single rationality test." Pet., pp. 9, 11, 13. This contention rests on a misunderstanding of the standard and a mischaracterization of the ruling below. The appellate court's decision is fully consistent, both in approach and result, with this Court's DFR rulings.

A. Under the DFR standards articulated by this Court, union actions breach the DFR only if they are discriminatory, in bad faith, or "wholly 'irrational' or 'arbitrary.'" *Air Line Pilots Ass'n, Int'l* v. *O'Neill,* 111 S.Ct. 1127, 1136 (1991); *see Vaca* v. *Sipes,* 386 U.S. 171, 190 (1967). Unions are to be accorded wide latitude and deference in addressing the competing interests of represented employee groups. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953); *Humphrey* v. *Moore,* 375 U.S. 335, 349-50 (1964); *O'Neill,* 111 S.Ct. at 1135-37. Further, union conduct must be evaluated in light of "the strong policy favoring the peaceful settlement of labor disputes" as well as "the facts and the legal climate that confronted the [union] at the time [its] decision was made." *O'Neill,* 111 S.Ct. at 1136. Contrary to the petition, pp. 11, 12, this Court has not mandated a rigid analytical approach that the lower courts must mechanically follow in applying the DFR standard.

B. The court below could hardly be said to have "disparage[d]" or "repudiat[ed]" this Court's DFR standard (*contra* Pet., pp. 9, 11) when it applied that standard in light of its application in prior decisions of this Court and other appellate courts, App., 10-15, rather than by focusing solely on the "arbitrary," "discriminatory" and "bad faith" "labels" which, as the court aptly observed, "are not self-defining." App., 11. The appellate court's ap-

proach was identical to that which has been followed by this Court and other appellate courts.[3]

The appellate and district courts measured ALPA's conduct against each prong of the DFR standard (*contra* Pet., pp. 11-14). They evaluated ALPA's actions based on "the situation in which ALPA found itself, [and] what ALPA did," App., 43, and, in "light of both the facts and the legal climate" that then confronted the union, *O'Neill,* 111 S.Ct. at 1136, and determined that ALPA did not act arbitrarily in delaying formal policy implementation while simultaneously pursuing an approach which was fully consistent with the merger policy's seniority integration procedures and by otherwise acting to protect the Ozark pilots. As the lower courts correctly concluded, ALPA acted to "bridge the gap" between the two pilot groups, to "obtain the best bargain possible" for the Ozark pilots and to protect them from "premature intra-union litigation" and the "calamitous" consequences with which they were threatened. App., 17, 18, 42-44, 50.

Further, the appellate court did not, *contra* Pet., pp. 10, 23, ignore plaintiffs' accusations of bad faith or discriminatory ALPA conduct. Instead, it again turned to other cases for guidance to ascertain the parameters of those components of the DFR standard, and, like the district court, carefully reviewed the record presented. The Seventh Circuit recognized that "a union may not take away the seniority of some employees for no reason other than that the losers have too few votes to affect the out-

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[3] *E.g., O'Neill,* 111 S.Ct. at 1135-37; *Humphrey,* 375 U.S. at 342; *Chaparro-Febus* v. *International Longshoremen Ass'n, Local 1575,* 983 F.2d 325, 330-31 (1st Cir. 1992); *Bennett* v. *Local Union 66, Glass Workers Int'l Union,* 958 F.2d 1429, 1437-38 (7th Cir. 1992) (cited at Pet., p. 17); *Gvozdenovic* v. *United Air Lines,* 933 F.2d 1100, 1106-07 (2d Cir.), *cert. denied,* 112 S.Ct. 305 (1991); *Ackley* v. *Local 337, Int'l Bhd. of Teamsters,* 910 F.2d 1295, 1307-08 (6th Cir. 1990) (original dissenting opinion adopted as opinion of court on rehearing in light of intervening *O'Neill* decision, *see* 948 F.2d 267 (6th Cir. 1991)).

come of an intra-union election, or that they opposed the union's leadership," or "sell an employee down the river for no reason at all, or for a reason forbidden on substantive grounds, such as race or internal union politics." App., 11. Thus, the court did not (*contra* Pet., p. 10 and App., 31, dissent from denial of rehearing) view "rote majority rule" as the measure of the DFR. However, the court also correctly recognized that plaintiffs must do more than simply affix "discrimination" or "bad faith" "label[s]" to ALPA's actions. App., 15. Turning to the evidence, the lower courts found nothing which demonstrated (*contra* Pet., pp. 22-23) that ALPA acted "to placate a larger more politically powerful segment of its membership at the expense of a much smaller, weaker group; [or] to advance the political interest of its President, Hank Duffy," App. 44; *id.*, 11, 13, 17-18, or that ALPA acted in bad faith. App., 11, 12, 15, 17-18, 45.[4]

Any claim of discrimination or bad faith was further dispelled by ALPA's extensive efforts specifically aimed at protecting the Ozark pilots, *supra*, pp. 4-5, by ALPA's willingness "to back the Ozark pilots if they chose to stand on their presumed rights and not ratify" the Merger Agreements, App., 50, and to withhold consent unless and until the Ozark pilots approved the Agreements, App., 4, 18, 50, and by the identical treatment accorded both pilot groups through the dovetailing of the seniority lists. App., 16. *See Humphrey*, 375 U.S. at 347 (dovetailing is "a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake" of a merger or acquisition).[5]

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[4] The appellate court's discussion of "mixed motives" on which the petition focuses, *see* Pet., p. 24, pertained only to the *Rakestraw* case. App., 19-20. As indicated, the lower courts found no evidence of improper ALPA motivation in *Hammond*.

[5] As the court below correctly observed, even "endtailing" of merging employee groups has been held to satisfy the DFR. App., 16; *Schick* v. *NLRB*, 409 F.2d 395, 398-99 (7th Cir. 1969); *Ackley*, 948 F.2d at 267; *Marshall* v. *Local 6, Brewers and Gen. Labor*

In sum, there is no divergence between the decision below and this Court's DFR caselaw which warrants Supreme Court review.

II. THE DECISION BELOW DOES NOT ESTABLISH ANY CONFLICT WITHIN THE CIRCUITS WARRANTING REVIEW BY THIS COURT

Plaintiffs also cannot establish that the decision below presents a conflict within the circuits or raises "recurring issues concerning the scope of each of the three prongs" of the DFR standard, Pet., p. 15, that require intervention by this Court.

A. Since this Court "clarified the [DFR] standard" in *O'Neill*, 111 S.Ct. at 1130, the lower courts have not demonstrated any difficulty in understanding its parameters. The standard has been consistently applied in all circuits, including the Seventh. For example, the appellate courts, like *Hammond*, *supra*, pp. 8, 10-11, have recognized that under the DFR standad established by this Court (and *contra* Pet., pp. 20-21), intentional union misconduct must exist to establish a "discriminatory" or "bad faith" DFR breach.[6] *O'Neill*, 111 S.Ct. at 1137

Dep'ts, 960 F.2d 1360, 1370 (8th Cir. 1992); *NLRB* v. *Whiting Milk Corp.*, 342 F.2d 8, 11 (1st Cir. 1965); *see also Chaparro-Febus*, 983 F.2d at 330-31 (cannot establish DFR breach merely by showing that the seniority system selected favors one employee group over another); *O'Neill* v. *Air Line Pilots Ass'n, Int'l* (on remand), 939 F.2d 1199, 1204 (5th Cir. 1991) (same).

[6] *Carter* v. *United Food Workers Int'l Union, Local 789*, 963 F.2d 1078, 1082 (8th Cir. 1992) (cited at Pet., p. 12) ("union intentionally and invidiously discriminated against" a protected class); *Bennett*, 958 F.2d at 1436-37, 1438 n.6 (Pet., p. 17) ("somewhat harder to find intentional misconduct," as required under DFR bad faith element, than arbitrary action by union); *Aguinaga* v. *United Food Workers Int'l Union*, 993 F.2d 1463, 1470 (10th Cir. 1993) (Pet., pp. 12, 13, 17, 23, 25) (discrimination and bad faith prongs require showing of "invidious" discrimination and "fraud, or deceitful or dishonest action," respectively); *Ooley* v. *Schwitzer Div.*,

(plaintiff must demonstrate "invidious 'discrimination' "); *Humphrey*, 375 U.S. at 348 (must demonstrate "substantial evidence of fraud, deceitful action or dishonest conduct"); *see also Amalgamated Ass'n of Street & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 301 (1971).[7]

B. Plaintiffs cannot manufacture an inter-circuit conflict warranting review simply by pointing to other decisions in which the DFR has been found to have been breached based on factual circumstances which differ radically from those found in *Hammond*. For example, the Ozark pilots were not denied input into the determination of their seniority (as in *Bernard* v. *Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 216-17 (9th Cir. 1989) (Pet., pp. 13-14, 16, 18-20) and *Beardsley* v. *Chicago & North Western Transp.*, 850 F.2d 1255, 1269 (8th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) (Pet., p. 21)), or denied a promised contract ratification (as in *Alexander* v. *International Union of Op. Eng'rs*, 624 F.2d 1235, 1240 (5th Cir. 1986), *International Bhd. of Teamsters* v. *NLRB*, 587 F.2d 1176, 1183 (D.C. Cir. 1978), and

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Household Mfg. Inc., 961 F.2d 1293, 1303-04 (7th Cir.), *cert. denied*, 113 S.Ct. 208 (1992) (requiring "invidious discrimination" to satisfy discrimination prong); *Chaparro-Febus*, 988 F.2d at 330-31 (union's determination on seniority must amount to "invidious discrimination" to breach DFR); *O'Neill* (on remand), 939 F.2d at 1203 (ALPA's actions not "sufficiently egregious," "intentionally misleading" or "invidious" enough to establish bad faith DFR breach); *Ackley*, 910 F.2d at 1307-08 (original dissenting opinion —adopted as the court's opinion on rehearing in light of *O'Neill*, *see* 948 F.2d 267—no DFR breach where union did not discriminate against a protected group); *see also Alicea* v. *Suffield Poultry, Inc.*, 902 F.2d 125, 130 (1st Cir. 1990); *Jones* v. *Union P. & R. Co.*, 968 F.2d 937, 941 (9th Cir. 1992) (Pet., p. 12) (DFR "is narrowly construed by the courts . . . so that unions may act freely in what they perceive are the best interests of their members generally").

[7] Contrary to Pet., p. 10, *O'Neill* only questioned the Seventh Circuit's use of an intentional misconduct requirement as applied to the "arbitrary" prong of the DFR standard. 111 S.Ct. at 1134-35.

Trail v. *International Bhd. of Teamsters*, 542 F.2d 961, 968 (6th Cir. 1976) (all cited at Pet., p. 17)). Neither did ALPA ignore its merger policy, *Bernard*, 873 F.2d at 216-17; *cf. Nellis* v. *Air Line Pilots Ass'n, Int'l*, 815 F.Supp. 1522, 1533, 1539 (E.D. Va. 1993) (Pet., pp. 16, 17) (no DFR breach where ALPA, as here, did not "ignore" its merger policy and undertook reasonable steps to benefit and protect plaintiffs' interests), otherwise discriminate against a protected class or act in bad faith (as in *Carter*, 963 F.2d at 1082 (Pet., p. 12) and *Denver Stereotypers Union, Local 13* v. *NLRB*, 623 F.2d 134, 137-38 (10th Cir. 1980) (Pet., p. 17)), or bargain away substantive rights already conferred upon a minority group in a collective bargaining agreement (as did the unions in *Beardsley*, 850 F.2d at 1269, *Goclowski* v. *Penn Central Transp. Co.*, 571 F.2d 747, 751 (3d Cir. 1977) (Pet., pp. 17, 26),[8] *Aguinaga*, 993 F.2d at 1470-71 (Pet., pp. 12-13, 17, 23, 25), *Colon Velez* v. *Puerto*

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[8] On remand in *Goclowski*, the district court concluded that the union, as here, did not contract away plaintiffs' seniority rights, but instead "acted to protect the interests of these employees as best it could." 545 F. Supp. 337, 346-47 (W.D. Pa. 1982), *aff'd*, 707 F.2d 1401 (3d Cir. 1982). *See also Association of Contracting Plumbers* v. *Local Union 2, United Ass'n of Journeymen*, 841 F.2d 461, 469 (2d Cir. 1988) (Pet., p. 17) (affirming lower court ruling that the union's breach of its constitution "does not give rise to a duty of fair representation" claim); *Walk* v. *P*I*E Nationwide, Inc.*, 958 F.2d 1323, 1329-30 (6th Cir. 1992) (Pet., p. 12) (affirming summary judgment because union's conduct, at most, amounted to "negligen[ce]" or a "mistake in judgment, [which is] not a basis for finding a failure of fair representation").

Contrary to Pet., p. 16, the issue in *United Steelworkers* v. *Rawson*, 495 U.S. 362, 376 (1990), was not whether the union violated its DFR, but whether it had assumed and violated a contractual obligation to employees under a CBA. Further, even if, as plaintiffs contend, Pet., p. 16, the merger policy is somehow analogous to a CBA, plaintiffs asserted no breach of contract claim based upon an alleged violation of the merger policy. Even if they had, ALPA's actions in establishing procedures consistent with its merger policy negate any claim that ALPA "fail[ed] to act" on any obligation owed to plaintiffs. *Rawson*, 495 U.S. at 375.

Rico Marine Management, Inc., 957 F.2d 933, 940-41 (1st Cir. 1992) (Pet., p. 12) and *Volkmen* v. *United Transp. Union*, 724 F.Supp. 1282, 1329-31 (D. Kan. 1989) (Pet., p. 21)).[9]

In sum, plaintiffs have not identified and cannot establish any conflict in the circuits over the application of the DFR standard.

III. REVIEW IS UNWARRANTED BECAUSE PLAINTIFFS CANNOT PREVAIL ON THEIR DFR CLAIM

Review of the decision below is additionally unwarranted because it would serve no purpose. The Ozark pilots' overwhelming approval of the Merger Agreements eliminated their ability to prove, as required, that ALPA was legally responsible for the injuries they allegedly suffered. App., 19 ("A wrong is actionable only when it causes injury . . ."); *Marshall* v. *Local Union 6*, 756 F.Supp. 408, 413 (E.D. Mo. 1991) (ratification of seniority agreement is "intervening event which eliminated" any improper union actions), *aff'd in part and rev'd in part*, 960 F.2d 1360, 1370 (8th Cir. 1992) (no DFR breach where union negotiated modified endtailing agreement which employees ratified); *Nicely* v. *USX*, 767

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[9] Consistent with the Seventh Circuit's determination that the merger policy did not strip ALPA of its ability to take actions designed to protect the interest of those employees it represented, other courts have afforded unions "flexib[ility]" in applying internal constitutions and policies in integrating seniority lists or in otherwise protecting employee interests. *Allen* v. *United Transp. Union*, 964 F.2d 819, 821 (8th Cir. 1992); *Air Wisconsin Pilots Protection Comm.* v. *Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991); *Baker* v. *Newspaper Union, Local 6*, 628 F.2d 156, 166 (D.C. Cir. 1980); *Nellis*, 815 F. Supp. at 1538-40; *Bates* v. *Locomotive Firemen, No. 472*, 56 L.R.R.M. (BNA) 2271, 2274 (M.D. Fla. 1964); *Norris* v. *Northeast Ill. R.R. Bd.*, 126 L.R.R.M. (BNA) 2954, 2958 (N.D. Ill. 1987); *Warner* v. *McLean Trucking Co.*, 136 L.R.R.M. (BNA) 2633, 2637-38 (S.D. Ohio), *appeal dismissed*, 137 L.R.R.M. (BNA) 3000 (6th Cir. 1991).

F.Supp. 728, 731-32 (W.D. Pa. 1991), *aff'd,* 928 F.2d 13 (3d Cir. 1992).[10]

The Ozark pilots' informed and "voluntary" vote, *contra* Pet., p. 26, could "not be withdrawn because the choice was an effort to make the best of a bad situation," or because plaintiffs later "wish they could have made better deals." App., 18-19. *Accord* App., 50, 53. Collective bargaining agreements entered into when prospects are dire are no less binding than those fashioned in a favorable economic climate. *Parker* v. *Connors Steel,* 855 F.2d 1510, 1520-21 (11th Cir. 1988) (affirming summary judgment for union against employees who ratified concessionary agreement after company threatened to close plant), *cert. denied,* 490 U.S. 1066 (1989); *Baker,* 628 F.2d at 166; *Sutton* v. *Weirton Steel Div. of Nat'l Steel,* 724 F.2d 406, 409, 412 (4th Cir. 1983), *cert. denied,* 467 U.S. 1205 (1984); *Macktal* v. *Secretary of Labor,* 923 F.2d 1150, 1156 n.26 (5th Cir. 1991). TWA legally "had every right to use economic pressure" in furtherance of its objectives, however repugnant that may have been to the Ozark pilots or ALPA. App., 18. The courts below properly rejected plaintiffs' attempt to disavow their vote as the product of "coercion." App., 18-19, 53.[11]

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[10] *Accord Anderson* v. *United Paperworkers, Int'l,* 641 F.2d 574, 580 (8th Cir. 1981); *Ackley* v. *Western Conf. of Teamsters,* 958 F.2d 1463, 1472-73 (9th Cir. 1992); *Acri* v. *International Ass'n of Mach.,* 781 F.2d 1393, 1397 (9th Cir.), *cert. denied,* 479 U.S. 816 (1986); *Deboles* v. *Trans World Airlines,* 552 F.2d 1005, 1019-20 (3d Cir.), *cert. denied,* 434 U.S. 837 (1977); *Ooley,* 961 F.2d at 1304; *Wood* v. *International Bhd. of Teamsters, Local 406,* 807 F.2d 493, 502-03 (6th Cir. 1986), *cert. denied,* 483 U.S. 1006 (1987); *Self* v. *Drivers Local 61,* 620 F.2d 439, 443 (4th Cir. 1980); *see Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 572 (1976).

[11] The dissent from the Seventh Circuit's denial of a rehearing in banc nowhere even suggests that ALPA's actions in the TWA-Ozark transaction violated the DFR. App., 27-32.

Plaintiffs also cannot establish that ALPA caused them injury when the record conclusively establishes, contrary to Pet., pp. 4-5, 10, 21, 23, 24, that "TWA, not the union, was applying the screws," App., 18, and alone made the decisions to transfer Ozark planes and furlough Ozark pilots, *supra*, pp. 4, 7, 8; App., 50 ("economic pressure applied by TWA")—carrier decisions that were not barred by merger policy, by the Wraparound Agreement or by the Ozark-ALPA CBA.[12] *Supra*, pp. 3, 7, 8.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[12] The continued efficacy of the Ozark-ALPA CBA following finalization of the merger was, at the least, uncertain. *See Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 40 (1987) (successor "not bound by the substantive provisions of the predecessor's" CBA); *Chicago, M., S.P. & P.R.R.* v. *RLEA*, 658 F.2d 1149, 1174 (7th Cir. 1981) (same under RLA), *cert. denied*, 455 U.S. 1000 (1982). And, a transition agreement entered into by, *inter alia*, representatives of the Ozark pilots expressly confirmed that the Ozark CBA was extinguished. App., 18, 53.